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DATE: June 14, 2017

RE: Feedback on Draft Report and Order from the FirstNet Colorado Governing Body and Staff / In the Matter of Procedures for Commission Review of State Opt Out Requests from the FirstNet Radio Access Network / PS Docket No. 16-269

This memo will follow up on my meeting on Friday, June 9, 2017 with Roberto Mussenden and Erika Olsen of the Public Safety and Homeland Security Bureau on behalf of the FirstNet Colorado Governing Body (FirstNet Colorado) and the FirstNet Colorado staff in the above referenced proceeding. Given FirstNet Colorado's prior meetings with representatives of

each Commissioner's office in connection with this Docket, we are copying each of them with this memo via electronic mail, as well as filing a copy of the memo in the record.

Regarding the draft of the Report and Order that will be considered at the Commission's June 22, 2017 open meeting (the "draft R&O"), FirstNet Colorado appreciates those provisions of the draft R&O that provide states a "meaningful opportunity" to exercise statutory rights to consider opting out of the national FirstNet network, including developing and completing requests for proposals and preparing and filing alternative opt-out plans with the Commission, as required by Congress.[1] We believe that the draft R&O does an excellent job at balancing the needs of the national effort with the ability of states to ensure that each has all options available to them to comply with statutory obligations. Any proposals to shorten the timelines in the Commission's draft R&O or make the procedures and requirements more onerous would limit a state's ability to prepare and file an alternative opt-out plan. We appreciate the chance to highlight a handful of specific points for Commission consideration as it plans to make a decision on June 22nd.

1. A meaningful opportunity for development and submission of an alternative state plan requires no less than the Commission's proposed 240 days.

- Any less than the 240 days proposed in the draft R&O would be an insufficient amount of time for a state to file an alternative plan with the Commission and FirstNet and would not provide the state with the required "meaningful opportunity" to opt out.

- The draft R&O provides for an opt-out state to have 240 days from the date of its opt-out notification to the Commission to file an alternative state plan in the docketed proceeding established for that state.[2] The 240 days includes 180 days to complete the request for proposal process and an additional 60 days to complete and submit the alternative plan in its entirety to the Commission and FirstNet.[3]

- The proposed 240 days is the minimum time that opt-out states will require to review FirstNet's network policies and develop an alternative plan that complies.

- We have reviewed the ex parte communication recently filed by AT&T.[4] FirstNet Colorado respectfully disagrees to shortening the time frames of the draft R&O. It is disconcerting to see AT&T use the excuse that "NPSBN has been long delayed" as a basis to shorten the already short period that a state has to respond. The "long delay" cannot be attributed to the states, and states should not lose a fair and reasonable time period to act in order to make up for this delay.

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[1] *Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network*, Report and Order on Circulation, Docket No. 16-269 ¶ 17 (dated June 1, 2017), http://bit.ly/2r6MTyM ("Draft Report and Order").
[2] Draft Report and Order ¶ 32.
[3] *Id.*, App. A, § 90.532(e)(2)(ii).
[4] AT&T Notice of Ex Parte Communication, June 9, 2017.

- Further, AT&T criticizes the 240 day period suggested in the draft R&O, and its requirement that "by that distant point," the draft R&O requires the opt out plan to be robust and fully realized. AT&T further criticizes the "lengthy" 240 day period, and suggests the alternative plan must, if the time period remains, require that at the end of that period there must be "an awarded, fully executed, final, and binding contract." This is necessary, AT&T claims, to ensure the "speedy deployment" of the NPSBN. Such arguments about timeliness are disingenuous. FirstNet Colorado notes that the timelines in the draft R&O are *far more demanding* than the time FirstNet required to produce its completed RFP, which occurred more than four years after the enactment of the Spectrum Act and after "more than a year of dialogue with public safety and the industry."[5] If there has been any delay, states should not be made to suffer the loss of a fair and meaningful opportunity to opt out in order to address it. Furthermore, AT&T does not anticipate a complete build out of the network for 5 years, significantly longer than many states had proposed. Providing states an additional 60 days to develop a long-term plan will not impact the viability of either the national or a state specific network.

2. We remain convinced that statutory rights of states would be better served if neither FirstNet nor AT&T were permitted to comment on any Commission filing made by a state seeking to opt out. These entities have a vested interest in making it more difficult for states to opt out, and are on record indicating as such. We believe there will be a serious credibility issue with any information provided by these entities objecting to a state's request to opt out. However, FirstNet Colorado understands the Commission's rationale as set forth in the draft R&O.[6] If the Commission is not prepared to accept our position and not permit these entities to comment on opt out filings from states, we urge the Commission to make its position clearer by indicating that any comments filed by FirstNet or AT&T in connection with a state's opt out filing be strictly limited factual information directly relevant to the technical parameters set by the Commission.

3. We commend the Commission for the language in the draft R&O related to the public comment period for network policies.[7] Such a requirement is critically important in furthering goals of transparency to the public and interested parties of the national network.

4. States must have the opportunity to amend or correct initial alternative plan filings.

- FirstNet Colorado agrees with the Commission's assessment that parties "should be allowed a limited means of correction" to any errors in their alternative plan filings, given the "first-of-its-kind" nature of this proceeding.[8] We also agree that amendment process

[5] *See, e.g.*, Press Release, FirstNet, FirstNet Issues RFP for the Nationwide Public Safety Broadband Network (Jan. 13, 2016), http://bit.ly/2pRQWj8.
[6] Draft Report and Order ¶ 30.
[7] Draft Report and Order ¶ 61.
[8] Draft Report and Order ¶ 36.

will "benefit both the parties and the Commission's understanding of the request, allowing for a full and thoughtful evaluation of the alternative plan."[9]

- The draft R&O provides the Bureau will review each opt-out state's alternative plan to "make an initial determination whether the plan meets relevant filing criteria" and then issue an "accepted for filing" public notice. NTIA and FirstNet will have 15 days from the issuance of this public notice to comment on the alternative plan. States will then have 15 days to amend their plans or file reply comments. FirstNet Colorado agrees that this "30-day pleading cycle allows for some iterative discussion between a state, FirstNet, and interested parties, while still providing a firm deadline and certainty of process."[10]

- Applicants are entitled to receive notice and an opportunity to amend before an agency can reject a complex, technical, and lengthy application.[11] In this regard, we also strongly disagree with the June 9, 2017 ex parte communication filed by AT&T, and we urge the Commission not to change the limited opportunity for an amendment process, which is necessary to afford states a fair, reasonable and meaningful opportunity to exercise its rights under the Act.

5. State plans including both a RAN and core would be consistent with the statute and would allow more efficient use of networks.

- We are familiar with, and support Southern Linc's suggestion that the Commission should adopt a position that a state or regional core for an opt out network is permissible. Especially given modern LTE core architecture, distributed cores are common throughout the country, and should be specifically permitted as an option by the Commission for opt out networks. Permitting alternative plans from opt-out states that include both a radio access network ("RAN") and an evolved packet core ("EPC" or "core") would allow states to use existing infrastructure – including existing core elements – to more efficiently and cost-effectively serve the public.[12]

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[9] *Id.* ¶ 36.

[10] *Id.* ¶ 35; *see also* Comments of the State of Florida, PS Docket No. 16-269, at 10 (filed Nov. 4, 2016), http://bit.ly/2sUqq9h ("Florida Comments") ("The Commission should not disapprove a plan without first addressing the alleged deficiencies with the State and allowing for the response or corrective action. The process should be an open dialogue between the two parties."); Alabama Response at 6 (filed Oct. 21, 2016) ("the Commission should have the latitude to seek additional information, and the State should have the opportunity to amend the Alternative Plan as necessary to demonstrate compliance with the legal right to opt-out based on the evolving statuary requirements. This right should be extended further, with the ability for the State to dispute a rejected Alternative Plan, and be provided the ability to cure the plan if warranted."); Comments of the State of Nevada, PS Docket No. 16-269, at 5 (filed Oct. 21, 2016) (an opt-out state "should be allowed to file amendments or provide supplemental information to their plan once it is filed with the FCC and prior to the FCC's decision"), http://bit.ly/2rWswrW.

[11] *See, e.g., Biltmore Forest Broad. FM, Inc. v. FCC*, 321 F.3d 155, 160 (D.C. Cir. 2003) (holding that lack of notice to an applicant deprives it of "fair warning that its application might be disqualified without an opportunity to correct it").

[12] *Ex Parte* of Trey Hanbury, counsel for Southern Communications Services, Inc. d/b/a Southern Linc to Marlene H. Dortch, Secretary, FCC, PS Docket No. 16-269, GN Docket No. 17-83 (filed May 8, 2017).

- We are also familiar with, and support the arguments of Rivada Networks related to the use of core elements in its recent filing with the Commission.[13] The position articulated by Rivada is especially important in connection with a State's ability to ensure quality and effective public safety communications in rural areas.

- In response to the requests from multiple filers that the FCC "affirmatively conclude that a state may include a separate state network core in its alternative plan" the Commission found, in the draft R&O, that the issue is outside the scope of its statutory review responsibility. The Commission said, however, that it "will not reject an otherwise qualified alternative plan that includes a proposed state core," and will limit its review "solely to the interoperability of the state RAN with the FirstNet network as directed by the Act and will not examine possible RAN interconnection with non-FirstNet networks or cores."[14] Colorado agrees that the Commission's review is limited to interoperability with the FirstNet network.[15]

- Moreover, the Public Safety Spectrum Act does not include a limitation that the "core network" consists solely of elements from FirstNet's national public safety broadband network.[16] Indeed, the Act explicitly envisions a network that takes "into account the plans developed in the State, local, and tribal planning and implementation grant program."[17]

6. States must have reasonable access to usable information to make opt-out determinations and develop alternative plans.

- The Spectrum Act requires FirstNet to provide "notice" to the states of the completion of the RFP process, including the "details of the proposed plan for buildout of the nationwide, interoperable broadband network in each State."[18] "Notice" in all instances means actual opportunity to review the materials in a meaningfully substantive way,[19] and here explicitly requires the details necessary for a state to develop an alternative plan that will comply with the interoperability requirement.[20]

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[13] *Ex Parte* of Declan Ganley and Joseph J. Euteneuer, Rivada Networks to Marlene H. Dortch, Secretary, FCC, PS Docket No. 16-269, GN Docket No. 17-83 (filed June 12, 2017).
[14] Draft Report and Order ¶ 62.
[15] Public Safety Spectrum Act § 6302(e)(3)(C)(i), 47 U.S.C. § 1442(e)(3)(C)(i).
[16] *See* Response of the State of Alabama, PS Docket No. 16-269, at 9 (filed Oct. 21, 2016) (the law does not "prohibit the state from deploying Core network elements to optimize backhauled traffic management or to address potential deficiencies in FirstNet's approach") ("Alabama Response").
[17] *Id.* § 6202(b)(2)(B), 47 U.S.C. § 1422(b)(2)(B).
[18] 47 U.S.C. § 1443(e)(1).
[19] In the Administrative Procedure Act context, for example, the public won't be seen as having adequate notice of agency action if an agency does not provide sufficient information for the public to fully understand the agency's intended plans and to formulate meaningful responses. *See* 47 U.S.C. § 553; *see also, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (an agency "has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible").
[20] 47 U.S.C. § 1443(e)(1).

- Arbitrary caps on access or restrictions on access to critical data file, such as native format .GIS files, fails to provide notice because the limitations deny the state a reasonable opportunity to review the merits of the Federal deployment plan.

- FirstNet must provide reasonable access to the Federal deployment plan for the state without arbitrary caps on access to files or limitations on access to native-format electronic files, which are crucial to develop comparative network coverage maps between the Federal plan and the state opt-out plans under consideration.

- The Commission's customary confidentiality protections and protective order processes, as outlined in the draft R&O and above, offer sufficient protection for information and data.

- Without sufficient information, parties are deprived of a meaningful opportunity to participate in a government process or proceeding.[21]

7. The Governor of a state need not personally notify the Commission and FirstNet of the opt-out decision.

- FirstNet Colorado agrees with the Commission's statement in the draft R&O that "either the Governor or the Governor's duly authorized designee" may provide notification of a state's decision to opt out.[22] The Spectrum Act does not require the Governor of an opt-out state to personally notify NTIA, the FCC, and FirstNet of the opt-out decision. This interpretation of the Act would lead to absurd results. As the Commission notes, Congress did not intend "for the Governor to be responsible for the purely ministerial act of transmitting notice of the decision to the Commission" or for the Act to "override the Governor's ability to delegate assessment and evaluation of the state plan, so long as the Governor remains accountable for the ultimate decision."[23]

[21] In the government procurement context, discussions between an offeror and the government must be "meaningful"—that is, they "must include sufficient information on the perceived weaknesses of the offeror's proposal so the offeror has a reasonable opportunity to address the weaknesses." *See Afghan American Army Services Corp. v. United States*, 90 Fed.Cl. 341 (2009) (citing *Advanced Data Concepts v. United States*, 43 Fed.Cl. 410, 422 (1999), *aff'd*, 216 F.3d 1054 (Fed.Cir.2000)); *see also, e.g.*, Christine Varney, Procedural Fairness, Department of Justice (Sept. 12, 2009), http://bit.ly/2s0CHvz ("our Supreme Court has laid out some general guideposts focusing on government transparency and the right of private parties to participate meaningfully in government proceedings affecting them. For instance, the Court has explained that '[a]n elementary and fundamental requirement of due process … is notice reasonably calculated … to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'").

[22] Draft Report and Order ¶ 12 (emphasis added); *see also* Florida Comments at 2 (filed Nov. 4, 2016), http://bit.ly/2sUqq9h ("The Commission should accept filings by the state governors' authorized designee(s) to allow for greater flexibility and convenience.").

[23] Draft Report and Order ¶ 12.

- The arguments offered by AT&T on this point in its recent ex parte communication[24] are without merit. Allowing a designee to transmit the decision aligns with state practice and procedure and decreases the state's administrative burden, without negatively affecting the opt-out process.[25] Even AT&T's suggested supplemental documentation from the Governor is unnecessary. There is no need for the Commission to tell each Governor how he or she must establish a "duly authorized designee." As the draft R&O notes, there is no good reason to increase the administrative burden of the states.

8. FirstNet's recent ex parte communication with its attached matrix[26] lends itself to a considerable amount of comment and debate – far more than the interested parties to this proceeding can be expected to do in the short period of time prior to the Commission's June meeting. The final version of such a matrix will be a very important piece of the opt-out process. FirstNet Colorado believes this discussion is best suited to occur within the Commission's proposal to have public comment on the policies that FirstNet and AT&T believe are relevant to the opt-out review.[27] In addition,

- As proposed by the Commission, the interoperability test should be focused on the technical issues associated with RAN interoperability to the nationwide network. Elements such as applications, devices and enterprise interconnections have nothing to do with ensuring an opt-out state's RAN is interoperable with the nationwide RAN.

- Any review should focus on interoperability at day one. The Commission cannot judge a state against what AT&T may do three or four years down the road. As long as a state commits to the standards process, it will be interoperable, assuming AT&T abides by the standards process. The test for interoperability should be very straight forward, "Does the state implement the following interfaces, yes or no?"

- Any interoperability analysis should focus on Band 14. Focusing on anything else would make it impossible for a state to be interoperable as AT&T's implementation of other frequencies is inherently proprietary.

Again, I appreciate your meeting with me on June 9th, and on behalf of FirstNet Colorado, we appreciate your consideration of our position.

[24] AT&T Notice of Ex Parte Communication, June 9, 2017.
[25] *See, e.g.*, Reply Comments of FirstNet Colorado Governing Body, PS Docket No. 16-269 (filed Nov. 21, 2016), http://bit.ly/2qXSUhQ.
[26] FirstNet Notice of Ex Parte Communication, June 9, 2017.
[27] Draft Report and Order ¶ 61.